Supreme Court, U.S.
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No. 03-213

IN THE

Supreme Court of the United States

MORA HOTEL CORPORATION N.V. and CHASCONA N.V.,

Petitioners,

—v.—

CIBC MELLON TRUST COMPANY, in its capacity as Trustee of the Chrysler Canada Ltd.'s Benefits Plan, the Chrysler Canada Ltd. Master Trust Fund, the Chrysler Canada Ltd. Non-Canadian Master Trust Fund, the Holmes Foundry Division Master Trust Fund, and the Chrysler Canada Ltd. Supplemental Unemployment Benefit Plans, and DAIMLERCHRYSLER CANADA INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

New York law, like the law of many states, provides that foreign money judgments should not be refused recognition for lack of personal jurisdiction where the defendant "voluntarily appeared in the proceedings, other than for the purpose of . . . contesting the jurisdiction of the court over him." After jurisdiction over petitioners was affirmed by the English judiciary up through the House of Lords, the New York Court of Appeals upheld the recognition of the English judgments against a defense of lack of personal jurisdiction in England. The Court held that the defendants had voluntarily appeared in the English courts because they had "argu[ed] the merits of the conspiracy claims in the English proceedings," "made arguments and presented proof" and caused the English judges to spend "considerable time . . . on the issue of the legal merits of the claims against" them, and thereby had done "more than they had to do to preserve a jurisdictional objection," including submitting very extensive papers and participating in a six-day hearing.

Does the New York Court of Appeals' interpretation and application of that New York statute, in the circumstances of this case, warrant review by this Court?

LIST OF PARTIES

Plaintiffs below are CIBC Mellon Trust Company ("CIBC Mellon") and DaimlerChrysler Canada Inc. ("DCCI"). CIBC Mellon is a Canadian trust company that serves as Trustee for certain employee retirement and pension plans maintained by DCCI. After obtaining several money judgments in England for damages from a many-tentacled fraudulent financial conspiracy, CIBC Mellon and DCCI commenced a proceeding in New York state court to recognize and enforce two of those judgments against petitioners in New York.

Defendants below, Mora Hotel Corporation N.V. and Chascona N.V., are privately-held Netherlands Antilles corporations that conducted business at the site of the Gorham Hotel, at 136 West 55th Street in New York, New York. Chascona held the fee interest, and Mora was the lessee.

RULE 29.6 CORPORATE DISCLOSURE

CIBC Mellon is 50% owned by Canadian Imperial Bank of Commerce, and 50% owned by Mellon Bank, N.A. through holding corporations. Mellon Bank, N.A. is itself 100% owned by Mellon Financial Corporation.

DCCI is a wholly-owned subsidiary of DaimlerChrysler Corporation, a public corporation headquartered in Detroit, Michigan.

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JURISDICTION

Jurisdiction over the issues presented by the first two questions presented in the Petition is properly invoked pursuant to 28 U.S.C. § 1257. The issue presented by the third question presented and argued in Point III of the Petition was neither raised nor decided below, and should therefore not be considered by this Court. *Adams v. Robertson*, 520 U.S. 83, 86 (1997); Robert L. Stern *et al.*, Supreme Court Practice 171 (8th ed. 2002).

STATUTES INVOLVED

This case involves Article 53 of the New York Civil Practice Law and Rules (CPLR), titled "Recognition of Foreign Country Money Judgments," and in particular, sections 5302-5305 thereof, which provide in pertinent part:

§ 5302. Applicability

> This article applies to any foreign country judgment which is final, conclusive and enforceable where rendered even though an appeal therefrom is pending or it is subject to appeal.

§ 5303. Recognition and enforcement

> Except as provided in section 5304, a foreign country judgment meeting the requirements of section 5302 is conclusive between the parties to the extent that it grants or denies recovery of a sum of money. Such a foreign judgment is enforceable by an action on the judgment, a motion for summary judgment in lieu of complaint, or in a pending action by counterclaim, cross-claim or affirmative defense.

§ 5304. Grounds for non-recognition

> **(a) No recognition.** A foreign country judgment is not conclusive if:
>
> 1. the judgment was rendered under a system which does not provide impartial tribunals

or procedures compatible with the requirements of due process of law;

2. the foreign court did not have personal jurisdiction over the defendant. * * * *

§ 5305. Personal jurisdiction

(a) Bases of jurisdiction. The foreign country judgment shall not be refused recognition for lack of personal jurisdiction if:

1. the defendant was served personally in the foreign state;

2. the defendant voluntarily appeared in the proceedings, other than for the purpose of protecting property seized or threatened with seizure in the proceedings or for contesting the jurisdiction of the court over him; * * * *

(b) Other bases of jurisdiction. The courts of this state may recognize other bases of jurisdiction.

COUNTER-STATEMENT OF THE CASE

Plaintiffs (respondents here) commenced this action to recognize and enforce in New York two money judgments that had been entered in England against the petitioners and numerous others ("the English Judgments") in an international fraudulent conspiracy case. This action was brought pursuant to, and decided under, the New York statute governing recognition of foreign country money judgments, Article 53 of the New York Civil Practice Law and Rules.

Petitioners misleadingly argue as though this were a conspiracy case in which the lower courts asserted jurisdiction in an unconstitutional manner. This is not a conspiracy case, and does not concern a New York court's exercise of jurisdiction. It is, rather, merely a garden-variety judgment recognition proceeding, involving judgments rendered in England, with the usual last-ditch jurisdictional arguments — none well-founded in the record — now thrown up to resist recognition.

Notwithstanding petitioners' efforts to imbue this case with substantial constitutional issues, the only question actually presented is whether the application by the New York courts of the New York judgment recognition statute, based on the Uniform Foreign Money-Judgments Recognition Act, and fully consistent with longstanding provisions of the Restatement [Second] of Conflict of Laws and Restatement [Third] of Foreign Relations Law, violated defendants' Fourteenth Amendment right not to be deprived of property without due process of law. Given the lack of any serious disagreement about the legal principle applied by the New York Court of Appeals — that "a defendant may be deemed to have made an appearance in an action, and, therefore, to have submitted to a court's jurisdiction, by, among other things, "taking steps in the action *after judgment either in the trial court or in an appellate court*" (Pet. App. 13a, citations to the Restatements of Conflicts of Laws and Foreign Relations Law omitted) — this case presents no issue whatever warranting this Court's review.

In their zeal to present a serious constitutional issue, petitioners wrongly accuse the New York Court of Appeals of lapses that did not occur and grossly mischaracterize the case. The Court of Appeals did not retroactively validate a void judgment, it did not waive a constitutional right of the petitioners, and it did not exercise a constitutionally impermissible form of jurisdiction. All it did, in the ruling complained of, was to (1) affirm the lower courts' conclusions that the English court had personal jurisdiction as required under the New York recognition statute, and (2) decline to review any further petitioners' claim that the English court lacked jurisdiction because petitioners had rendered consideration of that claim unnecessary when they affirmatively invoked the English court's jurisdiction in a post-judgment motion. Pet. App. 9a.

The two lower courts had already determined that the English court had jurisdiction from the outset (as three English courts had determined as well). It was petitioners' own affirmative conduct that blocked their ability (by obviating any need) to obtain yet a third hearing of their jurisdictional objection by a New York court, under a straightforward application of the provisions of New York's foreign judgment enforcement law providing that voluntary appearance generally represents a submission and eliminates any further challenge to personal jurisdiction. There is therefore no merit whatever to petitioners' defense or this petition. There is no serious doubt that the recognition and enforcement of the English Judgments does not violate the Fourteenth Amendment, and no conflict with any cited decisions of other courts on that point.

The judgment of eight English judges is that petitioners were properly subject to personal jurisdiction in England, and twelve unanimous judges in New York agreed that the English Judgments are entitled to recognition. There are no conflicts and no other "compelling reasons" (S. Ct. R. 10) for this Court to review the New York courts' determinations under the New York statute.

A. The New York Recognition Statute.

In New York, the recognition of foreign money judgments has been governed by Article 53 of the New York Civil Practice Law and Rules ("CPLR") since 1970. Article 53 is patterned on the Uniform Foreign Money-Judgments Recognition Act. Both before and after the statute was enacted, "New York has traditionally been a generous forum in which to enforce judgments for money damages rendered by foreign courts." Pet. App. 6a.[1]

Article 53 is a statutory outgrowth of the common-law comity doctrine. New York's comity doctrine embodies "an ordered sense of respect and tolerance for the adjudications of foreign Nations, paralleling that commanded among the States by the Full Faith and Credit Clause of the United States Constitution." *Gotlib v. Ratsutsky*, 83 N.Y.2d 696, 700 (1994). "The comity doctrine is . . . pragmatically necessary to deal properly and fairly with the millions of relational and transactional decrees and determinations that would otherwise be put at risk, uncertainty and undoing in a world of different people, Nations and diverse views and policies." *Id.* at 700.

CPLR Article 53 was intended to codify and clarify existing case law concerning the recognition and enforcement of foreign money judgments, and to promote the efficient enforcement of New York judgments abroad by "assuring foreign jurisdictions that their judgments would receive streamlined enforcement here." Pet. App. 6a-7a.

Under the statute, a foreign money judgment "is conclusive," CPLR 5303, and "must be enforced absent a showing of one of the grounds for nonrecognition specified

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[1] New York's generous tradition of enforcing foreign judgments extends equally to judgments that were entered on default, as here. *See Taub v. Taub*, 283 A.D.2d 567 (2d Dep't 2001); *Constandinou v. Constandinou*, 265 A.D.2d 890 (4th Dep't 1999); *Soloman Ltd. v. Biederman & Co.*, 177 A.D.2d 350, 350 (1st Dep't 1991); *Aspinall's Club Ltd. v. Aryeh*, 86 A.D.2d 428, 434 (2d Dep't 1982).

in CPLR 5304." *Watary Servs., Ltd. v. Law Kin Wah*, 247 A.D.2d 281, 282 (1st Dep't 1998). However, New York courts will not enforce a judgment if it "was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law" or if the foreign court "did not have personal jurisdiction over the defendant." CPLR 5304(a)(1), (a)(2). Listing several jurisdictional bases that must be recognized, CPLR 5305(a)(2) provides that a foreign judgment "shall not be refused recognition for lack of personal jurisdiction if . . . the defendant voluntarily appeared in the proceedings, other than for the purpose of protecting property seized or threatened with seizure in the proceedings or for contesting the jurisdiction of the court over him."

Although CPLR 5304(a) thus requires that the foreign judicial system had procedures compatible with due process and that the foreign court had jurisdiction over the defendant, there is no requirement that the foreign court's procedures or jurisdiction conform to those of New York or the United States. Indeed, CPLR 5305(b) specifically permits the court to recognize "other bases of jurisdiction" beyond the common bases specifically enumerated in CPLR 5305(a). Similarly, CPLR 5304(a)(1) requires only that there be a "system" compatible with the requirements of due process, not that the foreign country's procedures must be identical to ours or must follow every "jot and tittle" of the particular species of due process adopted by the enforcing state. *Soc'y of Lloyd's v. Ashenden*, 233 F.3d 473, 476-77, 478 (7th Cir. 2000); *see also Soc'y of Lloyd's v. Turner*, 303 F.3d 325, 330 (5th Cir. 2002); *Guinness PLC v. Ward*, 955 F.2d 875, 900 (4th Cir. 1992).

The absence of any statutory requirement that the foreign procedures conform precisely to our own is consistent with the traditional rule of comity that "[r]ecognition will not be withheld merely because . . . the rendering jurisdiction applies a law at variance with that which would be applied under New York . . . principles."

Watts v. Swiss Bank Corp., 27 N.Y.2d 270, 279 (1970). "[M]ere divergence from American procedure does not render a foreign judgment unenforceable," for, in Judge Cardozo's words, "We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home." *Pariente v. Scott Meredith Literary Agency, Inc.*, 771 F. Supp. 609, 616-17 (S.D.N.Y. 1991) (quoting *Loucks v. Standard Oil Co.*, 224 N.Y. 99, 111 (1918) (Cardozo, J.)). *See also Hilton v. Guyot*, 159 U.S. 113, 204-05 (1895) (discussed in *Pariente*, 771 F. Supp. at 617); *Ackermann v. Levine*, 788 F.2d 830, 842 (2d Cir. 1986); *Canadian Imperial Bank of Commerce v. Saxony Carpet Co.*, 899 F. Supp. 1248, 1252 (S.D.N.Y. 1995), *aff'd*, 104 F.3d 352 (2d Cir. 1996).

Recognition may not be defeated by raising factual or procedural issues that were or could have been encompassed within the proceedings before the foreign court (such as, here, whether petitioners or their owner, Marco Gambazzi, were members of the fraudulent conspiracy or committed wrongful acts), and any effort to consider or reopen those matters is improper. *See Greschler v. Greschler*, 51 N.Y.2d 368, 375-76 (1980); *Dunstan v. Higgins*, 138 N.Y. 70, 74-75 (1893); *see also Fickling v. Fickling*, 210 A.D.2d 223, 224 (2d Dep't 1994); *Porisini v. Petricca*, 90 A.D.2d 949, 950 (4th Dep't 1982). *Cf. Fiore v. Oakwood Plaza Shopping Ctr., Inc.*, 78 N.Y.2d 572, 577-78 (1991) (inquiry into the factual matters underlying a sister-state judgment is foreclosed in a judgment recognition proceeding), *cert. denied*, 506 U.S. 823 (1992); *Home Ins. Co. v. American Home Products Corp.*, 75 N.Y.2d 196, 205 (1990) (improper to engage in collateral review of merits of sister-state court's determination).

B. The English Proceedings.

Petitioners Mora and Chascona were named as defendants in a huge, multi-national fraudulent conspiracy suit in England. They were two of the 45 corporate defendants owned or controlled by the four individual

defendants and used by the individual defendants in fraudulent financial transactions. Owned and directed by defendant Marco Gambazzi, Mora and Chascona joined Gambazzi in asserting a challenge to personal jurisdiction in the English court. Based upon voluminous evidentiary submissions by plaintiffs, the English trial court made a *prima facie* determination that it had jurisdiction under the English "necessary or proper parties" rule, which in this conspiracy case was similar to the American form of co-conspirator jurisdiction over non-resident members of a conspiracy that has connections to the jurisdiction. The materials presented to the English courts demonstrated, *inter alia*, that the ringleader of the fraudulent conspiracy lived in England and that material acts in furtherance of the conspiracy took place in England. Petitioners litigated and lost their jurisdictional challenge in the trial court, Court of Appeal, and House of Lords.

Despite being afforded notice and an opportunity to be heard, petitioners initially adopted a strategy of non-participation in the proceedings, which they maintained even after being found subject to jurisdiction at the trial and appellate levels. They refused to comply with repeated court orders requiring disclosure, and ignored warnings that default judgments would be entered for non-compliance. Petitioners allowed default judgments to be entered against them, and failed to appear at the damages hearings. The judgments encompassed the total damages from the conspiracy because in England, as here, there is joint and several liability in fraudulent conspiracy cases.

Throughout these proceedings, petitioners and Gambazzi (all represented by the same English counsel) indisputably received ample notice of, and opportunity to be heard on, the exercise of jurisdiction over them, the claims asserted against them, the amount of damages sought, the *Mareva* orders against them, the "unless" orders against them (*see* Pet. App. 4a), and the damages assessment hearing. They made a knowing strategic choice not to participate and to let the

default judgments be entered. *See* Pet. App. 52a (defendants "elected to take default judgments, resting upon their rejected objections to the English courts' jurisdiction").

Subsequent to the New York Supreme Court's order recognizing and enforcing the judgments and the Appellate Division's affirmance, however, but before argument in the New York Court of Appeals, petitioners applied to the English High Court to set aside the default judgments entered against them, and for leave to defend the conspiracy and tracing claims on the merits. Pet. App. 6a, 12a-13a. After a six-day hearing, at which it considered "more than sixty lever-arch files [binders]", the High Court dismissed defendants' applications. *Id.* at 12a n.4.

C. The New York Proceedings.

Plaintiffs commenced an action in New York for recognition of the English Judgments, and sought summary judgment granting recognition. Defendants resisted, asserting that the English court lacked personal jurisdiction under CPLR 5304(a)(2) because the exercise of jurisdiction under the English "necessary or proper parties" rule did not meet the requirements of New York law and due process.

The trial court granted summary judgment to plaintiffs, finding that the English Judgments met the requirements for recognition under Article 53 of the CPLR and that none of the exceptions listed in CPLR 5304 applied to bar recognition. Pet. App. 51a-52a. The trial court ruled that the English court had personal jurisdiction over the defendants, as adjudicated by the English trial and appellate courts, and that England's rule of "necessary or proper party" jurisdiction, in the circumstances of this case, is compatible with New York co-conspirator jurisdiction. *See* CPLR 5304(a)(1), 5305(b); Pet. App. 51a- 52a.

The five-member Appellate Division unanimously affirmed the grant of summary judgment on different grounds. Rather than treating the English courts' extensive adjudication of personal jurisdiction under English law as *res*

judicata, the Appellate Division instead analyzed whether the materials before the English court established a *prima facie* case of conspiracy jurisdiction under New York norms (*i.e.*, acts of the conspiracy took place in the forum), and found that they did. Pet. App. 35a-42a. Defendants' belated assertions of innocence and non-involvement in the conspiracy had not been presented to the English court because defendants had defaulted, and therefore could not retroactively negate the *prima facie* basis that did exist for the English court's exercise of jurisdiction. *Id.* at 41a-42a.

On further appeal, the New York Court of Appeals held that "the English judgments at issue satisfy the statutory prerequisites for recognition." Pet. App. 1a. First, the Court rejected the defendants' argument under CPLR 5304(a)(1), which bars recognition if the foreign judicial system lacks impartial tribunals and procedures compatible with due process. *Id.* at 8a-9a.

Turning to defendants' argument under CPLR 5304(a)(2) that the English court lacked personal jurisdiction, the Court of Appeals addressed the contention that plaintiffs had made in a motion to dismiss the appeal, namely that after the New York Appellate Division's decision the defendants had "voluntarily appeared in the proceedings" within the meaning of CPLR 5305(a)(2) when they made an affirmative application to the English court to set aside the English Judgments and allow them to defend on the merits. Pet. App. 9a-13a. Applying CPLR 5305(a)(2), the Court of Appeals found that the defendants' invocation of the English court's jurisdiction at a later stage in the same proceedings did qualify as a voluntary appearance in the proceedings, because "they did more than they had to do to preserve a jurisdictional objection." *Id.* at 12a-13a. Plaintiffs had argued that this submission to English jurisdiction either mooted the appeal or acted as a judicial estoppel against inconsistent positions. However, the Court of Appeals decided only that, under CPLR 5305(a)(2), the voluntary appearance "abrogate[d] the reviewability of defendants' argument that the

English judgments are unenforceable in New York because the English courts lacked jurisdiction over them." *Id.* at 9a; *see also id.* at 12a-13a. It is that ruling — that petitioners' application to the High Court to set aside the English Judgments and to defend on the merits constituted a "voluntar[y] appear[ance] in the foreign proceeding within the meaning of CPLR 5305(a)(2)" (Pet. App. 13a) — which petitioners challenge here.

REASONS FOR DENYING THE WRIT

I. THE NEW YORK COURT OF APPEALS DID NOT VIOLATE PETITIONERS' DUE PROCESS RIGHTS.

A. New York's Decision To Recognize The English Judgments Based Upon Petitioners' Voluntary Appearance Before The English Courts Does Not Violate Petitioners' Due Process Rights.

Petitioners' argument, stripped of all bells and whistles, is that a New York court cannot, consistent with United States constitutional due process protections, enforce in New York a foreign judgment that is rendered against an entity that has voluntarily subjected itself to the foreign court's jurisdiction. Petitioners' position is not in accordance with general principles underlying personal jurisdiction or with this Court's longstanding jurisprudence delineating the due process clause's scope and reach, and no conflicts warrant this Court's review.

An objection to personal jurisdiction, like any other personal right, can be expressly or impliedly waived by words or conduct. *See Ins. Corp of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982). And voluntarily presenting the merits of a dispute to a competent tribunal for resolution or affirmatively utilizing procedural tools provided by a specific tribunal are two of the usual grounds on which courts find submission to a court's jurisdiction or waiver. *See id.* at 704 (citing *Adam v. Saenger*, 303 U.S. 59, 67-68 (1938)).

Of particular importance here are this Court's conclusions that "an individual may submit to the jurisdiction of the court by appearance," and that "[a] variety of legal arrangements have been taken to represent express or implied consent to the personal jurisdiction of the court." *Ins. Corp. of Ireland, Ltd.*, 456 U.S. at 703. This Court has also held

that "what acts of the defendant shall be deemed a submission to [a court's] power is a matter upon which States may differ," *Chicago Life Ins. Co. v. Cherry*, 244 U.S. 25, 29-30 (1917).

The New York Court of Appeals, consistent with these well-settled principles, ruled simply that petitioners' post-judgment appearance before an English High Court in which the petitioners submitted evidence pertaining to the merits of the fraud claims against them and in which petitioners failed "to preserve any objection to the High Court's jurisdiction" constituted a voluntary appearance under CPLR 5305. Pet. App. 12a-13a.

The New York Court of Appeals did not retroactively validate a void English judgment and it did not abrogate the petitioners' ability to assert the defense of lack of personal jurisdiction. It merely analyzed petitioners' actions before the English courts in accordance with this Court's teachings, and concluded that petitioners had voluntarily appeared by affirmatively arguing the "merits of the conspiracy claims in the English proceedings" and doing more than they had to do to preserve any jurisdictional objections. Pet. App. 12a. By making a voluntary appearance as defined by New York law, the petitioners waived their right to contest any further whether the English court had personal jurisdiction over them (*see id.* at 13a), without running afoul of the due process clause.

This holding is not in conflict with any judicial opinion issued by this or any other Court, and is directly supported by this Court's holding in *Chicago Life Ins. Co. v. Cherry* (cited approvingly in *Ins. Corp. of Ireland, Ltd.)* and its progeny. In that case, a Tennessee state court entered judgment against a group of insurance companies notwithstanding the fact that the insurance companies had allegedly never been served with process. *See Chicago Life Ins. Co.*, 244 U.S. at 29. When the insured sought to enforce the judgment against the insurer's assets in Illinois, the insurer contended, like petitioners here, that enforcing the judgment would violate its

procedural due process rights. *See id.* In ruling in favor of the insured, this Court observed that states have the power, in recognizing a foreign judgment, to decide what actions by a defendant constitute a voluntary appearance before the foreign tribunal (*see id.* at 30):

> If a statute should provide that filing of a plea in abatement, or taking the question [of personal jurisdiction] to a higher court should have that effect [of waiving a litigant's right to later contest the propriety of personal jurisdiction], it could not be said to deny due process of law ... If without a statute a court should decide [that a litigant's actions in a foreign court operated as a voluntary appearance there] ..., it would infringe no rights under the Constitution of the United States ... It can be no otherwise when a court so decides as to proceedings in another state. It may be mistaken upon what to it is a matter of fact, the law of the other state. But a mere mistake of that kind is not a denial of due process of law.

None of the cases petitioners cite is apposite or weakens the conclusive force of *Chicago Life Ins. Co.* For example, *Burnham v. Superior Court of Cal.*, 495 U.S. 604, 616 (1990), flatly rejected as a "thorough misunderstanding of our cases" the contention that in the absence of "continuous and systematic" contacts, a forum state was precluded from exercising jurisdiction over a non-resident who was served with process while in that state. *Burnham*'s reference to the long-standing rule that a judgment rendered by a court lacking personal jurisdiction is void under the principle of *coram non judice* does not aid petitioners, because that is not what happened here. In this case, the New York courts determined that the English court had personal jurisdiction over petitioners. Thus, under New York law, the English Judgments were not void. Whether New York was factually or legally incorrect in making this determination is, as explained

in *Chicago Life Ins. Co. v. Cherry*, of no constitutional moment.

For this reason, petitioners' citations to *Pennoyer v. Neff*, 95 U.S. 714 (1878), *Monroe v. Niven*, 20 S.E.2d 311 (N.C. 1942), *Keen v. Keen*, 60 A.2d 200 (Md. 1948), and *Wiles v. Wiles*, 315 P.2d 131 (Or. 1957), are meritless. In none of those cases, or any other case petitioners cite, did a litigant seek to challenge a state court's conclusion that a foreign court *had* personal jurisdiction over the party challenging the judgment. Instead, in the cases cited, the courts concluded that the court issuing the challenged judgment *did not have* personal jurisdiction.[2] Given these facts and the additional fact that three courts in England and three unanimous courts in New York all ruled that the English courts had personal jurisdiction over petitioners, their heavy reliance on the principle of *coram non judice* is puzzling. At best, petitioners' purported "due process" arguments amount to nothing more than a complaint that the New York Court of Appeals did not rule their way.

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[2] For example in *Gallagher v. Nat'l Nonpartisan League*, 205 N.W. 674, 675 (N.D. 1925), the North Dakota Supreme Court concluded that it was error for a lower court to enforce a judgment when it was clear that, upon the record presented, the judgment was issued even though the defendants had never been served with process. Similarly, in *Roberts v. Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 51 N.W. 478 (Minn. 1892), *aff'd*, 164 U.S. 703 (1896), the Minnesota Supreme Court did not discuss the issue of recognizing a foreign judgment. It only discussed whether a defendant's attempt to remove a case to federal court suspended state court proceedings such that a state judgment that was later issued was "void for want of jurisdiction." *Id.* at 478. Although the Court there noted in passing that defendant's attempt to vacate the state court judgment entered against it did not subject the defendant to the state court's jurisdiction, there is absolutely no indication that the defendant there, unlike here, ever argued the merits of its case to the Minnesota state court when seeking to vacate the judgment. *See id.* at 479. In *Bischoff v. Wethered*, 76 U.S. 812, 812 (1869), this Court refused to enforce an English judgment, the only evidence of which consisted of an "exemplified copy of a judgment ... , without [any evidence that the defendant was served properly], or [had] any notice of the suit." Obviously, this is not what happened to petitioners.

The rule relied on by the New York Court of Appeals to reject petitioners' defense is well within the limits of due process, and petitioners cite no case holding otherwise. *See Ins. Corp. of Ireland, Ltd.*, 456 U.S. at 709 (challenge to personal jurisdiction waived as a sanction for non-compliance with court order); *Nat'l Equip. Car Rental, Ltd. v. Szukhent,* 375 U.S. 311, 316 (1964) (agreement in advance to submit to court's personal jurisdiction was sufficient basis for personal jurisdiction); *Adam*, 303 U.S. at 67-68 (litigant's service of cross complaint pursuant to California law subjected him to the personal jurisdiction of the court there); and *Chicago Life Ins. Co.*, 244 U.S. at 29-30.

Moreover, that New York chose to reject petitioners' artificial distinction between a "post-judgment appearance" and a "pre-judgment appearance" does not give rise to any supposed procedural due process violation. Under New York law, the relevant inquiry is whether the defendant submitted to the foreign court's jurisdiction, "by, among other things, 'taking steps in the action *after judgment either in the trial court or in an appellate court*" (Pet. App. 13a) (quoting Restatement [Second] of Conflict of Laws, §33 cmt. b) — not whether the defendant's actions occurred prior to or after the judgment's entry. And nowhere does the Fourteenth Amendment, or the case law interpreting it, purport to restrict a state's power to decide that a defendant voluntarily submitted to a foreign court's jurisdiction sufficiently to recognize and enforce a foreign judgment, or to cabin that power to situations in which the defendant appeared prior to the judgment's entry.

Not only do petitioners cite no such case, at least one federal court to address that issue in the context of CPLR 5305(a) rejected any such distinction. In *S.C. Chimexim S.A. v. Velco Enters., Ltd.*, 36 F. Supp. 2d 206 (S.D.N.Y 1999), the court applied CPLR 5305(a)(2) to recognize a default judgment rendered in Romania despite the defendant's claim that the Romanian court did not have personal jurisdiction over it. Following entry of the default judgment in Romania,

the defendants appealed and during the course of the Romanian appellate proceedings attacked the default judgment on the merits, *see* 36 F. Supp. 2d at 215, just as the petitioners unsuccessfully did here.[3] The federal district court, like the New York Court of Appeals here, held that the defendant's activity in the Romanian appellate court operated as a voluntary appearance for purposes of CPLR 5305(a) and that "[o]n this basis alone ... the Romanian courts had personal jurisdiction over [the defendant]." *Id.* at 215; *see also Nippon Emo-Trans Co. v. Emo-Trans, Inc.*, 744 F. Supp. 1215 (E.D.N.Y. 1990) (defendant abrogated ability to raise jurisdictional defense to enforcement of a Japanese judgment after arguing merits of claims in Japan and losing jurisdictional defense there).

The formalistic rule petitioners imagine would not only interfere with New York's state sovereignty, but also encourage litigants abroad to engage in procedural gamesmanship under cover of the Fourteenth Amendment. Defendants in foreign cases would be rewarded for their decision to refrain from appearing until after judgment is entered by a foreign tribunal. A rule encouraging initially defaulting litigants to hold back their defenses and delay asserting them to a foreign court until after default judgment, or to relitigate their jurisdictional defense in U.S. courts even after raising the merits in the foreign court post-judgment, has nothing to recommend it.

B. The New York Court Of Appeals Did Not Retroactively Validate A Void Judgment.

Contrary to petitioners' submission, which contends that the New York Court of Appeals retroactively validated a

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[3] Petitioners' claim that the facts of *S.C. Chimexim* "are in striking contrast to this case, where Petitioners did not argue on the merits to the English Courts at any level," (Pet. App. 18), is in direct conflict with the Court of Appeals' factual determination that petitioners "were arguing the merits of the conspiracy claims in the English proceedings," Pet. App. 12a.

judgment which was void *ab initio* for lack of personal jurisdiction, the English Judgments were never void, and the unanimous decision by New York's highest court did not retroactively validate them. Rather, the New York Court of Appeals affirmed the unanimous findings of both the appellate and trial courts that the English courts had personal jurisdiction, and, pursuant to state statute, declined to consider petitioners' arguments to the contrary (arguments fully considered and rejected by both the appellate and trial courts) because petitioners had taken actions that precluded that defense.

Citing case law back to 1839, petitioners spend pages arguing that a judgment entered without jurisdiction is void. This assertion is accurate but irrelevant. The *coram non judice* principle is irrelevant here because the English judgments were rendered by a tribunal that *had* personal jurisdiction over petitioners. Every single court to have considered the issue has determined that the English trial court had jurisdiction over the petitioners at the time it rendered judgment against them.

The trial, appellate and highest courts of England – eight judges in all, including the five unanimous law lords in the House of Lords – considered and rejected petitioners' jurisdictional arguments in England. Despite the summary nature of recognition proceedings, *see* CPLR 5303 (permitting enforcement of a foreign judgment through expedited procedure of motion for summary judgment in lieu of complaint), petitioners were again given the opportunity to raise and litigate their jurisdictional defenses here in New York. They took full advantage of that opportunity, raising the due process "minimum contacts" arguments they now make to this Court. Both the trial and intermediate appellate courts in New York fully considered, and soundly rejected, petitioners' jurisdictional defense, holding that the English court had personal jurisdiction over petitioners such that the judgments should be recognized under New York state law. The refusal by the New York Court of Appeals to re-re-consider these

arguments, because of petitioners' intervening appearance in England, did not validate a void judgment. It left in place a judgment that the English courts and the Appellate Division had already determined to be jurisdictionally proper, and which was additionally proper (so far as New York law is concerned) because of CPLR 5305(a)(2).

The state court findings of fact on which the New York courts predicated recognition are never once addressed in the Petition, nor challenged by petitioners here—and are in any event unreviewable this Court, *see, e.g., Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 111-12 (1980) ("we customarily accept the factual findings of state courts...") (citing *Lloyd A. Fry Roofing Co. v. Wood*, 344 U.S. 157, 160 (1952)). Those findings, including the extent of petitioners' appearance in the English courts, fatally undermine the foundation upon which the Petition is constructed.

The New York Court of Appeals carefully reviewed commentary and case law construing CPLR 5302(a)(2) and determined that petitioners' post-judgment application fell within its terms. That determination was not a retroactive validation; it was a ruling that petitioners' appearance in England precluded any further contest of the English Court's personal jurisdiction. The question answered by the Court of Appeals was not whether petitioners' English application was a submission to jurisdiction, retroactive to the date they were served, but rather whether petitioners did more than they had to do to preserve their jurisdictional objections. Pet. App. 10a. If they did, they "forfeited the right to claim an exception" under CPLR 5305. David D. Siegel, CPLR Practice Commentaries C5305:1, 7B McKinney's Consol. Laws of N.Y. Ann. at 556 (West 1997). The Court of Appeals' determination that the petitioners' application to the English courts constituted such forfeiture was a matter of statutory interpretation and not, as petitioners would have it, a "defiant practice of judicial reincarnation." Pet. 19.

The New York Court of Appeals was well within its discretion in not addressing an argument that was rendered academic under CPLR 5305(a)(2) by petitioners' voluntary appearance in England to contest the merits of the fraud claims levied against them. No constitutional violation arises from the New York Court of Appeals' exercise of judicial discretion in this manner and none of the "compelling reasons" enunciated in Rule 10 of this Court's rules are present here.

II. THE QUESTIONS PETITIONERS RAISE CONCERNING THE DUE PROCESS IMPLICATIONS OF CONSPIRACY JURISDICTION ARE NOT PROPERLY PRESENTED ON THIS RECORD.

Petitioners seek this Court's review to "clarify the limits" on conspiracy jurisdiction, citing purported conflicts among the various states as to their application of this form of personal jurisdiction. But the Court of Appeals decided no issue of conspiracy jurisdiction, and its holding that petitioners' actual participation in the English courts obviated the need to address that issue makes its consideration by this Court equally unnecessary and inappropriate. *See Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("[i]t is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case"); *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944) ("[i]f there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality ... unless such adjudication is unavoidable").

A. The Judgment Below Presents No Issue Of Conspiracy Jurisdiction Under New York Law Or Otherwise.

The Court of Appeals rendered no opinion about conspiracy jurisdiction and rested its judgment on quite other grounds. Indeed, *no* American court has issued any ruling in this case regarding the scope of conspiracy jurisdiction. The lower New York courts simply found that the English court's exercise of jurisdiction over petitioners was compatible with due process. Petitioners have no Constitutional right to insist that the English courts adhere to every "jot and tittle" of New York concepts of due process. *See* cases cited at 6-7 *supra.* Mere differences in foreign procedures are no bar to recognition, much less a constitutional bar.

Not only did the New York courts not consider the scope of American conspiracy jurisdiction; consideration of that issue is not necessary to decide the recognition case below. The English judgments are recognizable either on the Court of Appeals' rationale (participation obviated the objection to personal jurisdiction under CPLR 5305(a)(2)) or on the rationale of the trial court that England's jurisdictional rules, as applied, are sufficiently compatible with due process to permit recognition. Neither of those rationales calls for any searching examination into New York's own rules of conspiracy jurisdiction. Whether enforcement on that ground in New York would deprive petitioners of property without due process is a different question than whether, on some given set of facts, a U.S. state's exercise of personal jurisdiction over an absent defendant under a conspiracy jurisdiction theory offends due process of law.

Even putting to one side the absence of any holding on the issue by the New York Court of Appeals, or even its considered view, the record below is in any event a singularly inappropriate one to review for the "minimum contacts" petitioners now demand, given the limited nature of that record due to petitioners' willful default. That default necessarily limited the New York courts to the question of

whether the *prima facie* record made in England would support jurisdiction under New York norms. Thus, the Appellate Division applied New York law to determine if a New York court, faced with the identical record on a jurisdictional motion to dismiss, would also have denied that motion to dismiss on the *prima facie* record.

Because of defendants' default, that *prima facie* record of jurisdiction is now deemed established as a matter of law. *Staton Wholesale v. Barker*, 257 A.D.2d 902, 903 (3d Dep't 1999) (recognizing Texas judgment where defendant lost jurisdictional challenge and then defaulted in Texas; Texas' jurisdictional determination became *res judicata*).[4]

B. The New York Appellate Division Recognized The English Court's Jurisdiction Based Not On A Co-Conspirator's Domicile But On Acts Of The Conspiracy In England.

Even if *some* issue of conspiracy jurisdiction could be argued on this record, it would not be the issue that petitioners present in their second question and Point II. Petitioners' premise – that this case presents the issue whether jurisdiction may be predicated "under a co-conspiracy theory, where there are no acts or harmful effects in England and jurisdiction over that defendant was based solely on a residence of one alleged co-conspirator" (*see* Pet. at ii (second Question Presented) and Pet. 24) – is false.

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[4] Other New York state courts have applied this rule to recognize foreign country judgments. *Wimmer Canada, Inc. v. Abele Tractor & Equip. Co.*, 299 A.D.2d 47, 50-51 (3d Dep't 2002) (enforcing Canadian default judgment over defense of lack of personal jurisdiction; evidentiary record submitted in Canada showed basis for jurisdiction); *Porisini v. Petricca*, 90 A.D.2d 949 (4th Dep't 1982) (defendant who defaulted in England after litigating and losing personal jurisdiction challenge was bound by evidence before English court, and could not raise additional matters to challenge recognition).

The Appellate Division held that "[t]he affidavits and supporting materials provided to the English court were sufficient to have demonstrated, prima facie, that [petitioners] . . . were active participants in the conspiracy alleged in the present case *which conspiracy included acts which took place in England.*" Pet. App. 39a (emphasis added). The Appellate Division went on to specify examples of those English acts. *Id.* at 39a-41a. As petitioners have not argued that there is anything unconstitutional in the assertion of *in personam* jurisdiction on those grounds, petitioners' second question is not posed by this case and presents no issue for this Court's review.[5]

It is true that the *English court's* assertion of jurisdiction was based on the domicile of a co-conspirator, which is a proper basis for jurisdiction under English law.[6] But the Appellate Division applied New York law, not English law, in reviewing the English evidentiary record and determining that that English court had personal jurisdiction sufficient for New York to enforce the English judgments. Its application of New York law to the facts here, and its finding that co-conspirator jurisdiction existed over the petitioners, were based not on domicile but on the acts and effects of the conspiracy in England. Pet. App. 39a. Petitioners' attempt to obtain review of whether conspiracy jurisdiction *based on*

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[5] The Appellate Division correctly held that the evidence submitted in England of acts of conspiracy in England supported a finding of jurisdiction under New York principles. *See, e.g., Dixon v. Mack*, 507 F. Supp. 345, 348 (S.D.N.Y. 1980) (members of conspiracy subject to jurisdiction in forum where acts in furtherance of conspiracy took place); *Cleft of the Rock Found. v. Wilson*, 992 F. Supp. 574, 582 (E.D.N.Y. 1998) (same). Petitioners themselves approvingly cite numerous federal decisions upholding conspiracy jurisdiction where some acts in furtherance of the conspiracy have occurred in the forum state. Pet. 26-27.

[6] Notably, England, like the United States, nonetheless requires a court to consider issues of *forum non conveniens* before exercising jurisdiction over necessary or proper parties.

the domicile of an alleged conspirator is "patently unconstitutional under our Due Process Clause" (Pet. 24) fails at its premise.

III. NO ISSUE CONCERNING DISPARATE TREATMENT OF DOMESTIC AND FOREIGN JUDGMENTS WAS PRESENTED OR DECIDED BELOW, OR WARRANTS THIS COURT'S REVIEW.

Petitioners' third question presented, argued in Point III of the Petition, asks the Court to review whether New York's treatment of foreign judgment recognition proceedings differently from the treatment it accords state or federal judgments violates the Fourteenth Amendment. Pet. 28-30. They complain that New York's treatment of participation on the merits as foreclosing personal jurisdiction objections to foreign judgments, while participation is generally not preclusive of such objections for domestic judgments, is "discriminatory state action" violating the Equal Protection Clause. Only *Cooper v. Aaron*, 358 U.S. 1, 19 (1958), is cited to support this novel argument. Pet. 30.

Because petitioners' equal protection challenge was neither raised nor decided below, it presents no issue for this Court's review. *Adams v. Robertson*, 520 U.S. 83, 86 (1997); Robert L. Stern *et al.*, Supreme Court Practice 171 (8th ed. 2002).

Nor, even if it were properly preserved, is the equal protection challenge, which implicates no conflict between the New York Court of Appeals and other appellate courts, worthy of this Court's attention.

First, New York does not distinguish between any groups of persons: differential treatment of judgments, where those *judgments* may be obtained by New Yorkers, other Americans, or foreigners, works no denial of equal protection.

Moreover, this Court has repeatedly recognized that differential treatment in and of itself does not violate the Constitution. As the classifications at issue here (foreign vs. domestic judgments, or merits vs. recognition proceedings) "neither involv[e] fundamental rights nor proceed[] along suspect lines," they are "accorded a strong presumption of validity." *Heller v. Doe*, 509 U.S. 312, 319 (1993). If there is a rational relationship between the disparate treatment and a legitimate governmental purpose, the classification "cannot run afoul of the Equal Protection Clause." *Id.*

The Constitution itself treats judgments rendered in a sister state or federal court differently from those rendered abroad; only the former are subject to the Full Faith and Credit clause of Article IV, Section 1 of the Constitution, which commands the courts of each State to accord full faith and credit to judgments of state courts, and to the Supremacy Clause, which commands comparable respect for federal judgments. The statute implementing the full faith and credit clause has never been successfully challenged for being constitutionally underinclusive.

No case petitioners cite, and none we have seen, finds an equal protection violation in the fact that recognition of foreign judgments is governed by basic principles of comity (codified by the 31 states, including New York, that enacted the Uniform Foreign Money-Judgments Recognition Act) rather than by the constitutional and statutory commands of full faith and credit for domestic judgments. The differences in such treatment, and the reasons for it (the balancing of international interests and the rights of its own citizens), were recognized by this Court as early as 1895. *See Hilton v. Guyot*, 159 U.S. 113, 141 (1895) (observing that whether a foreign judgment "shall be allowed to operate within the dominion of another nation, depends upon ... 'the comity of nations' ... international duty and convenience, and ... the rights of [the recognizing state's] own citizens, or of other persons who are under the protection of [the recognizing state's] laws"); *Jaffe v. Accredited Sur. & Cas. Co.*, 294 F.3d

584, 591 (4th Cir. 2002) (recognizing different standards in recognition of U.S. and foreign judgments). A rational basis clearly justifies any differing treatment.

Notably, too, any differences in treatment have inured to the benefit of petitioners here, not to their detriment. Had petitioners been sued in a sister state, lost a challenge to personal jurisdiction, and then defaulted in that state, the resulting judgment would have been subject to full faith and credit in New York without any opportunity for relitigation of the jurisdictional question. *See, e.g, Staton Wholesale v. Barker*, 257 A.D.2d 902, 903 (3d Dep't 1999) (recognizing Texas default judgment and refusing to consider defendant's personal jurisdiction defense as Texas court's determination on that issue was final); *Boorman v. Deutsch*, 152 A.D.2d 48, 52-53, 54 (1st Dep't 1989) (defendant could either litigate the personal jurisdiction issue in the New Jersey action, or default in that action and mount a collateral attack later in New York, but having chosen to raise the jurisdictional question in New Jersey and lost, he could not raise the issue again in New York), *appeal dismissed*, 76 N.Y.2d 889 (1990). It is only because the judgment sought to be recognized here was from a foreign country that petitioners were provided the opportunity to re-litigate their jurisdictional defenses at all (an opportunity that the Court of Appeals held they lost by taking steps to vacate the default judgments and arguing the merits, as provided by CPLR 5305(a)(2)). They should hardly be heard to complain now that by having afforded them that greater opportunity — which only their own conduct forfeited — New York denied them equal protection.

The short answer to petitioners' complaint that, had they been sued in New York in the first instance, they would have been permitted to contest the case on the merits and preserve their jurisdictional defense on appeal (Pet. 28-29), is that New York has no power to transform English judicial practice, no obligation to conform its practice to England's, and good reasons for its practices as regards both domestic

and foreign judgments. The more summary nature of enforcement proceedings (whether for domestic or foreign judgments) promotes such legitimate interests as respect for sister courts, the interests of finality and uniformity in determinations, the interests of New York litigants in foreign courts under principles of reciprocal respect, and well-settled collateral estoppel principles. Those same interests justify the rule of New York (and all the states that have followed the Uniform Act) that actual participation in foreign judicial proceedings, beyond what is necessary to contest jurisdiction, warrants foreclosing further objection to personal jurisdiction.

Petitioners identify no conflict among any courts concerning the constitutionality of this different treatment and no other consideration warranting this Court's review of this unpreserved claim.

CONCLUSION

The petition for a writ of certiorari should be denied.

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Respectfully submitted,

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